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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/628,383	07/29/2003	Hector A. Solorio	58880/315	4327
23838	7590	06/15/2004		
KENYON & KENYON 1500 K STREET, N.W., SUITE 700 WASHINGTON, DC 20005				
EXAMINER BHAT, NINA NMN				
ART UNIT		PAPER NUMBER		
1761				

DATE MAILED: 06/15/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No. 10/628,383	Applicant(s) SOLORIO ET AL.	
	Examiner N. Bhat	Art Unit 1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
 - If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
 - If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
 - Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 04 March 2004.
- 2a) ☐ This action is FINAL. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-25 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-25 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|---|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date <u>1-9-2004</u> . | 6) <input type="checkbox"/> Other: _____ |



DETAILED ACTION

1. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for a patent.

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

2. Claims 1-3, 17 and 25 are rejected under 35 U.S.C. 102(b) as being anticipated by EP 1 210 880.

EP 1 210 880 teaches providing a 3X or 2X concentrate which can be used in a number of food products which includes beverages, ice creams, and creamers which includes high potency sweetener; flavoring; sugar substitute; alcohol which reads on both ethanol as well as polyols and would inherently provide a concentrate having less than about 32° Brix because the sweetener, flavoring and sugar substitute is within the range as claimed by applicant.[Note paragraphs 040,0455,0529-0546, 0591-0602, Page 9, lines 45 to Page 15, line 17]

3. Claims 1-24 are rejected under 35 U.S.C. 102(b) as being anticipated by Zablocki et al.

Zablocki et al. teach a frozen beverage concentrate which can be used in making carbonate, non-carbonated soft drinks, still beverages, fruit-juice beverages, squashes,

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cordials, alcoholic, and nonalcoholic beverages. The invention includes providing a stabilizing gum which renders the beverage stable for about 4 months under typical storage conditions. The acidic edible liquid can be frozen and used in frozen juice compositions. The sweetener includes high intensity sweeteners or conventional caloric sweeteners or a combination of both. The high intensity sweeteners may include aspartame, acesulfame-K, sucralose, saccharin, alitame, cyclamates, stevia derivatives, thaumatin or polyol sugar alcohols. Caloric sweeteners include sucrose, high fructose corn syrup, invert sugar, dextrose crystalline fructose and high conversion corn syrup. The sweetener used in the composition includes about 0.2-about 0.5%. Flavorings such as cola, imitation orange, lemon grape can also be included in the syrup as well as FD&C colors. The acidic edible liquid can be used and diluted with carbonated water, water and further can include liqueurs such as aquavit, crème de menthe, grand marnier, drambuie, chartreuse, cream liqueurs, benedictine and mixtures thereof. The acid syrup concentrate and beverage composition contains deacylated xanthan gum and can also include a preservative. The composition taught in Zablocki et al. fully anticipates applicant's concentrate and beverage composition although the Brix is not explicitly recited, it is considered to be inherent in the composition taught by Zablocki et al. as the amount of sweetener used in the composition is within the range as taught by applicant.

4. Claims 1-24 are rejected under 35 U.S.C. 102(e) as being anticipated by Broz 2002/0197376.

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Broz teaches a beverage concentrate, which provides a low calorie, carbonated frozen beverage, which can be mixed with carbonated water and whipped to provide an overrun of 100%. The beverage composition includes water, a polyol, flavor, acidulant, buffering salts, and high intensity sweetener. [Note the abstract and Paragraphs [009], [0010]] The proportions of ingredients are within the range as claimed by applicant, specifically, the amount of polyols include from about 20 to 50% by weight of a combination of polyols, about 5 to about 10% comprising sorbitol. The flavor component used in the composition is between 0.05% to about 2 % by weight.[Note Paragraph 0022 and Examples 1-3] Although the Brix is not explicitly recited, it is maintained that inherently the concentrate would have a Brix which is less than about 32°, thus the composition is fully anticipated by Broz.

5. Claims 1-24 are rejected under 35 U.S.C. 102(e) as being anticipated by Lee et al. 2002/0197371.

Lee et al. teach a combination of one or more non-nutritive sweeteners, which includes sugar alcohol and D-tagatose to provide a low calorie or zero calorie frozen carbonated beverage. From the Table 1, and Paragraphs [0025-0032], the composition comprising a high potency sweetener; flavor, sugar substitute, alcohol and a Brix within the range as claimed by applicant has been fully taught by Lee et al. The Brix although not specifically recited would inherently be in the range as taught by applicant as the compositional ingredients of the concentrate and frozen beverage are within the same range as taught by applicant thus fully anticipating applicant's claims as presently drafted.

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6. Claims 1-24 are rejected under 35 U.S.C. 102(a) as being anticipated by Dubois et al. WO 01/085130.

Dubois et al. teaches a non-caloric or reduced calorie frozen carbonated beverage and method of making, the freezing point of a diet beverage syrup is reduced through the use of a freezing point depressant which used to replace a portion of a high potency non-caloric sweetener. The high potency sugar replacement is erythritol, which is used in an amount of up to 3.5% (w/v). A diet cherry cola frozen carbonated beverage included 0.43% cola flavoring combined with 0.02% of preservative 3.45% to about 3.5% of a sweetener system. the sweetener system contained 3.41 and 3.49% of erythritol, and 0.02% to 0.05% aspartame and 0.005 to 0.008 saccharin.[Note Page 11, paragraph {049-050}]. The composition as claimed fully anticipates applicant's claims as presently drafted. With respect to the concentrate having less than about 32o Brix, this would be inherent from the composition as described because the proportion of ingredients in the concentrate to provide the frozen beverage as described by Dubois et al. is within the range as claimed by applicant thus anticipating applicant's claims.

7. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. Baccus, Jr. teaches a process for preparing a low calorie beverage syrup. Fisher et al. teach providing a spoonable frozen food product. GB 2 130 070 teaches an improved semi-frozen beverage concentrate. WO 96/37120 teaches providing frozen cocktails made from a flavor concentrate. The concentrate includes artificial flavors, natural fruit juice, fruit fiber, sweetener, either natural sugar or

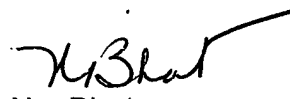
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a high potency sweetener, or a combination thereof. The Brix of the concentrate can vary from 10° to 25°.

8. Any inquiry concerning this communication or earlier communications from the examiner should be directed to N. Bhat whose telephone number is 571-272-1397. The examiner can normally be reached on Monday-Friday, 9:30AM-6:00PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).


N. Bhat
Primary Examiner
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